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No. 91-1478

In The

Supreme Court of the United States

October Term, 1991

PARK J. ANDERSON, *et al.*,

Petitioners,

v.

BOBBY BATTLE, *et al.*,

Respondents.

and

UNITED STATES OF AMERICA,
Intervenor,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The Petition for Writ of Certiorari should not be granted. The remand of the Tenth Circuit Court of Appeals requiring a trial court to make specific findings as to a state's compliance with orders requiring the desegregation of its prisons was in full accord with Rule 52 of the Federal Rules of Civil Procedure.

2. The Petition for Writ of Certiorari should not be granted. The remand of the Court of Appeals for factual findings as to a state's compliance with orders requiring desegregation of its prisons is in accord with the recent decisions of this Court in *Board of Education of Oklahoma City v. Dowell,* 111 S.Ct. 630, 112 L.Ed.2d 715 (1991), and *Freeman v. Pitts,* ___ U.S. ___, 1992 W.L. 59190 (1992).

PARTIES

The respondents accept the listing of the parties as presented by the petitioners with the exception of its reference to the United States as being an intervenor "on the side of the Petitioner." The United States intervened in this matter on March 15, 1973, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2. It raised in its complaint in intervention alleged segregation by race. These allegations were expanded to reach other issues on March 5, 1974. The United States has not participated in this matter since April 16, 1986, when the Court of Appeals issued its opinion ordering this case remanded for findings as to compliance. When last participating in this litigation, the United States participated as plaintiff-intervenor. *Battle v. Anderson*, 188 F.2d 1421, 1422 (10th Cir. 1986).

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the inmates of the Oklahoma Department of Corrections, respectfully pray that this Court deny Petitioner's Petition for Writ of Certiorari filed herein.

JURISDICTIONAL ISSUES

The respondents received a copy of the Petition for Writ of Certiorari on March 12, 1992, and this brief in opposition is timely filed as provided by Rule 15.2 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE NOT CITED BY THE PETITIONER

Other than the Constitutional provisions and statutes cited by the petitioner, respondents believe this case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

FACTS BEARING ON THE GRANTING OF CERTIORARI

The Court of Appeals for the Tenth Circuit has remanded this case for a hearing on the status of

compliance with orders which require the State of Oklahoma[1] to end racial segregation in its prison system. In order to avoid this review, the state has distorted the record in this case, suggesting that compliance with these orders is a long-settled matter which should escape further review. In spite of detailed testimony by a court-appointed Fact Finder of widespread and persistent violations of the desegregation orders, the district court has twice failed to make detailed findings as to the status of this compliance. With a twist of fact and logic, the state now attempts to block that review.

The pending petition for *certiorari* seeks to vacate the remand of the United States Court of Appeals for the Tenth Circuit. The remand over which review is sought is the second remand by the court of appeals following a hearing conducted in September 1983. The first remand, in 1986, required the trial court to examine the numerous allegations of continued violation of the court's orders as they related to racial discrimination and segregation. *Battle v. Anderson*, 788 F.2d 1421 (10th Cir. 1986), *reh'g denied*, May 19, 1989. The court of appeals also suggested, in light of the passage of time, that a hearing be held to update the record. *Id.* Upon remand, the trial court refused to hold an evidentiary hearing and failed to make

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[1] The petitioners in this case are public officials of the State of Oklahoma who have been sued in their official capacities. These officials include the members of the Oklahoma Board of Corrections, the Director of the Oklahoma Department of Corrections and the Warden of the State Penitentiary and the Granite Reformatory, two of the largest prisons in Oklahoma. For ease of reference and clarity, they are referred to in this brief as the State of Oklahoma.

findings as to whether the state had complied with the orders to desegregate. Rather, it examined the 1983 record solely for evidence of a continuing intent to discriminate. The district court found no evidence of a discriminatory intent and ordered its oversight of defendants' compliance to end. A second appeal ensued. Again, the circuit court remanded the case, making the purpose of the remand explicit:

> This case is remanded for a full evidentiary hearing concerning compliance at the present date by Oklahoma Department of Corrections (DOC) with the existing orders and injunctions in this action concerning racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, *see Battle v. Anderson*, 376 F.Supp. 402, 428-30 (E.D. Okla. 1974); *Battle v. Anderson*, 457 F.Supp. 719, 739-40 (E.D.Okla. 1978), along with such further actions and orders in connection therewith or resulting therefrom as may be appropriate. The evidentiary hearing should focus on job assignments, but should also cover segregation in celling and dining, as well as other claims of segregation.

Battle v. Anderson, No. 90-7012, slip op. at 2 (10th Cir. Oct. 3, 1991), *reh'g denied*, Dec. 13, 1991. It is this remand for an evidentiary hearing which is now challenged before this court.

The issue of racial discrimination is one of nine different areas of prison operations originally tried before the Eastern District of Oklahoma in 1974. The court entered a detailed remedial order after finding violations in all nine areas. In addition to race, the court's order included access to courts, due process in disciplinary

procedures, use of chemical agents, medical care, correspondence rights, and religious freedom. *Battle v. Anderson*, 376 F.Supp. 402 (E.D. Okla. 1974). Later, the court entered remedial orders concerning conditions of confinement. *Battle v. Anderson*, 457 F.Supp. 719 (E.D. Okla. 1978).[2] All of the original orders remain in full force and effect.[3] *Battle v. Anderson*, 788 F.2d at 1428.

Contrary to petitioners' assertions, the state has never been found to be in compliance with the court's orders on desegregation, nor has the court of appeals "reinstituted federal supervision which has not existed for nine years." Petition for Certiorari at 21. In suggesting that the Oklahoma prison system has been found in constitutional compliance in 1982 by both the trial court and the court of appeals, the petitioners seriously overstate those findings, taking them out of context. Petition for Certiorari at 15. The issue litigated in 1982 did not deal with racial discrimination. The sole question was whether

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[2] This order was appealed by the state. During the course of that appeal, the state conceded the unconstitutionality of the conditions in Oklahoma prisons and sought a remand for the limited purpose of requiring the district court to consider the state's proposals for remedying the admitted violations. *Battle v. Anderson*, 594 F.2d 786, 792 (10th Cir. 1979). On remand, the state presented a plan which closely resembled the district court's original order. The primary modification of the court's order was to allow the state additional time to comply.

[3] In the course of this litigation, the trial court vacated an order which required single celling. After repeated hearings regarding this part of the court's remedy, the court granted permission to the state to double cell indefinitely. *See Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983).

double celling in Oklahoma prisons was unconstitutional in light of *Rhodes v. Chapman*, 452 U.S. 337 (1981). The trial court found that the double celling did not create unconstitutional conditions but retained jurisdiction over that issue for fear of conditions reverting to their prior state. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Oct. 12, 1982). Due to a finding of constitutionality with respect to double celling, the court of appeals split on the issue of whether jurisdiction should be retained on this limited issue. *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983). It is a major distortion of the Tenth Circuit's 1983 opinion concerning double celling and overcrowding to claim that any of that discussion bears upon the issue of racial discrimination. It is an equally grave distortion to suggest that the circuit court's recent remand reinstituted federal supervision after nine years.

Petitioners imply that the injunctions governing the state's conduct were lifted nine years ago – this is blatantly incorrect. Furthermore, asserting that the district court's 1983 decision dismissing court oversight on racial issues withstood appellate review is a misrepresentation. The court's injunctions have never been dissolved and the State of Oklahoma has never sought a vacation of the orders. The 1983 district court order ending court supervision specifically held, "All of this court's orders and injunctions as modified heretofore remain in full force and effect." *Battle v. Anderson*, No. 72-95, slip op. at 10 (E.D. Okla. Dec. 30, 1983). *See also, Battle v. Anderson*, 788 F.2d 1421, 1428 (10th Cir. 1986). Appendix to Petition for Certiorari at 37. The implication, with respect to racial discrimination, is even more misleading. The trial court's 1983 decision to end its active supervision of compliance

of the orders was reversed with respect to racial integration. *Battle v. Anderson*, 788 F.2d at 1428. The district court's second attempt to dismiss supervision was again reversed by the order petitioners now seek to have reviewed. *Battle v. Anderson*, No. 90-7012, slip op. (10th Cir. Oct. 3, 1991). Twice in nine years, the trial court has sought to end its active supervision over the state's compliance with its orders concerning racial discrimination. On each occasion, the trial court failed to find the state had complied with the court's orders. The Tenth Circuit properly has again remanded for review of compliance.

The State of Oklahoma has never sought modification or vacation of the injunctions entered to remedy *de jure* racial discrimination. The remand which the state now seeks to have reviewed does not involve the question of whether any of the injunctions should be lifted, but only whether the court should hold an evidentiary hearing to determine the present status of the state's compliance with orders dealing with racial segregation and discrimination before it changes its remedial process. The court of appeals has ordered the district court to make such a review.

The injunctions which the trial court has been ordered to review were entered to remedy *de jure* racial discrimination in the Oklahoma prison system. The original 1974 trial revealed wide and pervasive racial discrimination in the state penitentiary:[4]

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[4] This case originally covered the Oklahoma Penitentiary and a system of prisons under its control. Later, after Oklahoma's prison system was consolidated into a single statewide system, the orders were extended to cover the entire state system.

Racial Discrimination and Segregation.

12. Prior to the July riot, the policy and practice at the Oklahoma State Penitentiary was to maintain a prison system segregated by race and by means of which black inmates were subjected to discriminatory and unequal treatment. Except for the maximum security unit, where inmates under disciplinary punishment were confined in single cells, all inmates were routinely assigned to housing units on the basis of race. The reception center, the mess hall, the recreation yard and barber facilities were racially segregated. Black inmates were discriminated against in job assignments and were subjected to more frequent and disparate punishment than white inmates. The guard force was and remains predominantly white. A policy statement issued by the Department of Corrections on October 20, 1972, declared the official departmental policy to be that all of its correctional facilities would be integrated in order to insure equal rights and equal opportunity to all persons confined therein. This policy statement also directed correctional administrators to formulate, implement and follow up procedures to insure that discrimination did not occur in practice. . . . Both the policy statement and accompanying operations memorandum were completely ignored by the Warden at the Oklahoma State Penitentiary at McAlester. Racial segregation, as had been practiced prior to the issuance of these directives, continued unabated. Not until the July riot did any noticeable changes occur. Only at that time, operating under emergency conditions, were inmates randomly lined up and ordered into cells. . . . [T]here is no present assurance that

> housing units will not become resegregated when normal operations are restored.

Battle v. Anderson, 376 F.Supp. at 409-10. The trial court then entered extensive remedial orders which the State of Oklahoma did not appeal.

In 1978, the trial court conducted an extensive review of the state's compliance with the orders covering racial discrimination and segregation, as well as other injunctions. *Battle v. Anderson*, 457 F.Supp. 719 (E.D. Okla. 1978). The court found wide-spread violations of these orders and continuing racial segregation. *Id.* at 731-732. Segregation in housing and discrimination in job assignments continued. As the trial court had feared, unconstitutional segregation in multi-occupancy cells had resumed. With respect to compliance at the Oklahoma State Penitentiary, the court found:

> In March 1974, individual cells at McAlester were integrated. The warden of McAlester was deposed on May 4, 1978. At that time, there were no integrated cells at McAlester out of approximately 400 multiperson cells. In August 1978, there were no integrated cells out of approximately 300 multiperson cells.

Battle v. Anderson, 457 F.Supp. at 731.

In March 1981, Judge Bohanon, the original trial judge, appointed a Fact Finder to assist the court in gathering facts relevant to the status of compliance on race, as well as the other issues where injunctions had been entered. In September 1983, a nine-day hearing was held on the status of compliance.

The Fact Finder reported widespread violations of the court's orders dealing with race. In spite of the court's orders enjoining job discrimination, the Fact Finder reported that job discrimination continued with the more desirable jobs being predominantly assigned to whites. For instance, at the Joseph Harp Correctional Center, the Fact Finder reported the following:

> At Joseph Harp Correctional Center, fourteen job categories were out of balance. Whites were over-represented in most desirable jobs such as library, clothing room, warehouse, canteen, Capital grounds crew, maintenance, chapel, inside orderlies, and orderlies for Units B & C. The explanation for imbalances are not credible. For example, the excuse given for the imbalance of white orderlies at Unit B is that this is a 'meritorious' dorm, implying a resultant lack of minorities to fill these positions. The fact is, however, that Unit B's population is racially balanced and there should be no difficulty balancing these job assignments. On the other hand, while whites seem to disproportionately fill the desirable positions, only minorities are assigned to the 'trash crew.'

Fact Finder's Report filed 4/1/83 at 62. While the seriousness of the problem varied from prison to prison, the pattern was the same.

> At the Stringtown Correctional Center, again the same deficiencies exist. Eleven job categories are out of balance. The explanation provided most often is that the imbalance is "due to inmates' skills and experience" and "by the request of the supervisor." These are not adequate explanations to justify the imbalances. The Court's

> order clearly states that skills and experience acquired in prison may not serve as a basis for selection of inmates for particular jobs or promotions if the preference would have a racially discriminatory effect; yet this type of excuse is often given for imbalances.
>
> At McLeod Correctional Center, the same pattern of discrimination was noted. There, many desirable jobs employ only a few inmates. In the great majority of cases, whites filled these positions. This same pattern was found at all of the other institutions. For example, working in the unit canteen is considered a highly desirable job at most institutions. A review of the latest racial balance reports indicates that these positions were filled by white inmates in all but two cases.
>
> At Mabel Bassett Correctional Center, the assignments to jobs employing large numbers of inmates were racially balanced, but assignments to some of the more desirable jobs employing just a few inmates were held primarily by whites. In addition, at Jess Dunn Correctional Center, an explanation given for imbalances was that "these are desirable positions which inmates request." The warden did indicate that, "Our staff will try to balance the other positions by the time the next racial analysis report is due at your office." The Fact Finder has, however, heard this refrain in too many reports, for too many years.

Id. at 61. Eight years after the court's order was entered, discrimination remained unabated.

In the weeks immediately preceding the hearing, the Fact Finder noted that the defendants had begun to make

some progress in job assignments, as well as in other areas. Transcript of 9/21/83 hearing at 928. Nonetheless, to achieve compliance, the Fact Finder recommended the Department of Corrections adopt a specific plan of action targeting these problems. Fact Finder's Report filed 4/1/83 at 63.

The defendants also have failed to eliminate the vestiges of segregation in housing. The court required that the defendants cease segregating multi-occupancy cells. This order arose out of the practice of assigning cellmates based on race. *Battle v. Anderson*, 376 F.Supp. at 410. The compliance measure for this order was to achieve integration of multi-person cells within four standard deviations of what would be expected if cell assignments were strictly at random. In 1983, the housing patterns revealed the continuing practice of routinely assigning only blacks to room with blacks and whites to room with whites. Fact Finder's Report filed 4/1/83 at 68-69.

In 1983, the Fact Finder found that there were 80 double cells at Conner Correctional Center. With random assignment within four standard deviations, there would be 21 to 39 mixed-race cells. *Id.* at 69. Instead, there were only five mixed black-white double cells.[5] *Id.* at 68-69. At Lexington Correctional Center, a medium security prison,

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[5] In his report, the Fact Finder focused on the number of black-white mixed cells, concluding that the number of Indians and "others" is so small "that it did not affect the analysis." *Id.* at 68.

there were 101 double cells. Rather than the expected 31 to 51 mixed-race cells, there were none.[6] *Id.*

The defendants also failed to eliminate the vestiges of segregated housing units. At the time of the Fact Finder's Report less than half of the Oklahoma penal institutions' major housing units were racially integrated. Six out of the eleven prisons had failed to comply with the court order requiring housing units to be racially balanced within 10%. Fact Finder's Report filed 4/1/83 at 56-58. In addition to its failure to integrate housing units, the Department of Corrections also failed to meet their reporting requirements. *Id.* For example, the Oklahoma State Penitentiary's report for August 1982 reported full compliance with the court's goal of the racially balanced housing units. An analysis of the report, however, revealed seven housing units were actually out of balance. The same type of misreporting of compliance occurred at the Oklahoma State Reformatory, Mabel Bassett Correctional Center, and Ouachita Correctional Center. At the Lexington Prison, the report was resubmitted because of errors. The "corrected" report only represented housing 453 of 581 inmates assigned to Lexington. Fact Finder's Report filed 4/1/83 at 57-58. The Court's Fact Finder concluded the reports "were not being given serious attention". *Id.*

Other significant violations of the order were also shown to continue in 1983. In spite of orders to end racial segregation, the department operated segregated dining

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[6] This racial imbalance is in spite of the fact that the inmates in those segregated cells came from racially integrated county jails. Transcript of 9/26/83 hearing at 1,031.

halls at the penitentiary. The segregation was reported by a black inmate who reported that a guard had ordered him out of the "white" dining hall. Transcript of 9/20/83 hearing at 238 (Fact Finder Albach). The warden responded by sending out a memo. At the hearing on compliance, the warden admitted the segregation of the dining hall continued despite the written policy to the contrary. Transcript of 9/26/83 hearing at 1,160 (Warden Brown). According to Director Meacham, the segregation continued for a long enough period of time that staff believed the dining halls were supposed to be segregated. Transcript of 9/29/83 hearing at 192 (Director Meacham). The segregation of the dining halls was finally stopped through the intervention of the Fact Finder. Transcript of 9/28/83 hearing at 1,191 (Warden Brown); and transcript of 9/21/83 hearing at 430 (Fact Finder Albach).

The 1983 evidence of continuing discrimination and non-compliance with the remedial orders went largely unchallenged. After hearing the evidence but prior to ruling, Judge Luther Bohanon recused himself and this case was reassigned to Judge Frank Seay, Chief Judge of the Eastern District. Three weeks after being assigned the case, Judge Seay ruled that the state was not in compliance with the orders requiring desegregation.[7] Nonetheless,

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[7] The totality of the court's findings as to compliance with the orders on race read:

> There are four subjects of previous court orders that are still found to be inadequate and not in compliance: racial integration, access to courts, equal protection guarantees for women, and vacating to

(Continued on following page)

the court dismissed oversight of this as well as other areas. At the same time, he ordered: "All of this court's orders and injunctions as modified heretofore remain in full force and effect." *Battle v. Anderson*, No. 72-95, slip. op. at 10 (E.D. Okla. Dec. 30, 1983).

The plaintiff class appealed, challenging the end of court oversight. The state did not appeal. As was set forth, *supra*, the circuit court found that the trial court had not entered adequate findings relating to the allegations of non-compliance as to racial discrimination. *Battle v. Anderson*, 788 F.2d at 1425. Appendix to Petition for Certiorari at 18-22. The case was remanded.

On remand, the district court again failed to make findings regarding the allegations of non-compliance. Instead, the trial court examined the 1983 record for proof of an existing intent to discriminate. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Dec. 22, 1989). Appendix to Petition for Certiorari at 43. The circuit court has again remanded this case, explicitly requiring a review of the

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(Continued from previous page)

> human habitation the East and West Cellhouses of the Oklahoma State Penitentiary at McAlester, Oklahoma. . . .
>
> Racial integration of the occupants of double cells is found to be almost non-existent in the Oklahoma prison system. Racial integration of cells is strictly by voluntary action only.

Battle v. Anderson, No. 72-95, slip op. at 6 (E.D. Okla. Dec. 30, 1983).

state's compliance with the orders requiring desegregation of the prisons. It is from this remand, that the state has sought *certiorari*.

SUMMARY OF ARGUMENT

The elimination of racial discrimination and segregation as a matter of practice and policy from this state-operated prison system has been a daunting task. In the 1983 record of the state's compliance with the court's orders, the evidence of continued discrimination and segregation stands largely unchallenged. Housing remains segregated; whites continue to receive preferences for better jobs; and even as late as 1983, guards were found to be enforcing racial segregation in the dining hall at the penitentiary. These, as well as other vestiges of the segregated prison system which were found to exist in 1974, continue to exist in violation of the court's order.

In spite of the seriousness of these allegations, the plaintiffs and the court of appeals have been unable to secure an examination by the trial court of practices in Oklahoma prisons and to make factual findings adequate for review. The trial court has refused to enter findings which detail the extent to which the state has complied with the court's prior orders which required an end to segregation in the prison system. When the trial court most recently failed to examine compliance in its December 22, 1989 opinion, the court of appeals remanded with explicit directions for the court to examine the current status of the state's compliance with orders which have been in effect since 1974.

The charge that this remand is contrary to Rule 52 of the Rules of Civil Procedure and is contrary to the precedents of this Court cannot be sustained. The remand was in fact consistent with Rule 52. Rather than taking on the task of finding facts after a trial court had twice refused to make appropriate findings, the court of appeals again remanded the case to the trial court – this time with specific instructions to examine compliance with certain enumerated orders.

This remand is also consistent with the most recent decisions of this Court – *Board of Education of Oklahoma City v. Dowell,* 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) and *Freeman v. Pitts,* ___ U.S. ___, 1992 W.L. 59190 (1992). Both of these decisions require a trial court to look beyond protestations of good faith and to specifically examine the record of compliance before reducing oversight or modifying or vacating a court order. This is exactly the process which has been ordered by the court of appeals.

In light of the court of appeals' compliance with the rules, laws and procedures which govern this case, there are no grounds upon which the petition should be granted.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT VIOLATE RULE 52 BY REMANDING THIS CASE FOR A FULL HEARING ON THE PLAINTIFFS' ALLEGATIONS OF NON-COMPLIANCE.

The trial court wrote its most recent decision in this case, as if it were writing on a clean slate, its decision

ignored the official sanction of segregation woven into the history of the Oklahoma prisons. It seems that the court has already put away the volumes which chronicle the reasons why court orders had to be written to stop segregation in prison housing and to secure, regardless of race, fair consideration for preferred jobs. Even more distressing, the court refused to examine whether compliance with these orders had been achieved. Instead, the court looked at this case as a new case, where a practice of official segregation remained to be shown and where no orders had been entered.

The district court was seemingly oblivious of the fact that the inmate housing and employment had already been found to be racially segregated by policy and orders entered to change that system. Instead of focusing on whether those orders had been complied with, the court focused its inquiry upon whether there was a current policy of segregation. Finding none, the court dismissed its oversight. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Dec. 22, 1989). Appendix to Petition for Certiorari at 43.

The court of appeals, in its remand, orders the court to refocus its attention. It requires the court to judge current actions of the state from the perspective of the history of the case and the orders entered. Petitioners' contention that the appellate court violated Rule 52 of the Federal Rules of Civil Procedure by remanding this case for a hearing and findings as to the state's compliance stands the process on its head. This assertion arises out of the bountiful confusion of the petitioners as to the obligations of the trial court once *de jure* discrimination had been found.

The trial court and the petitioners seemingly urge that after seventeen years under court jurisdiction, regardless of the state's actual compliance with the injunctions, proof of good intentions is sufficient to dismiss oversight. This simply is not the law. Once racial segregation was proven, those operating the system were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."*Green v. School Board of New Kent Co.*, 391 U.S. 430, 437-438 (1968); *Columbus Board of Education v. Penick*, 443 U.S. 449, 458-459 (1979); *see also, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

With the finding that Oklahoma had created a segregated prison system, the issue for the trial court was whether the state had met its affirmative burden of eliminating the effects of its segregation.

> Each instance of a failure or refusal to fulfill this affirmative duty continues this violation of the Fourteenth Amendment.

Columbus Board of Education v. Penick, 43 U.S. 449, 459 (1979) (White, J.) and *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). At this stage of the litigation, the focus of the inquiry is not simply whether the officials have abandoned their discriminatory purpose.

> [T]he measure of the post-*Brown I* conduct . . . under an unsatisfied duty to liquidate a dual system, is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. . . . As was

> clearly established in *Keys* and *Swann*, the Board had to do more than abandon its prior discriminatory purpose.

Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979) (White, J.).

Following the finding of *de jure* discrimination, the law requires the court look beyond the mere intent of the state officials – it must determine whether the state has effectively eliminated the segregation. In its 1986 opinion, the court of appeals remanded this matter to the district court for findings and recommended the trial court hear evidence as to the present state of compliance with the court orders. Despite the fact that by the time the district court addressed the case, the trial record was seven years old and had been heard by another judge, the trial court refused to hold a hearing.

In its review of this seven year old record, the trial court persisted in not examining the state's compliance with its orders. The trial court entered findings as to the state's intent. The trial court did not find that the dual system had been eliminated nor did the trial court find that the state had complied with the court's orders. It failed to make the findings which are at the heart of its inquiry at this stage. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Dec. 22, 1989). The 1991 remand by the circuit court sets out in specific detail the findings which the trial court needs to make and orders the trial court not to rely on a decade old record but instead to review present compliance. The remand of the circuit court does not violate Rule 52 of the Federal Rules of Civil Procedure. Requiring the trial court to make such determinations is precisely what the Rule envisions.

II.

THE REMAND BY THE COURT OF APPEALS IS IN ACCORD WITH THE RECENT DECISIONS OF THIS COURT.

On two recent occasions, this Court has examined the record in two school desegregation decisions to determine, among other things, the scope of the inquiry necessary before a trial court can vacate or modify a desegregation decree. Contrary to the petitioners' assertions, those rulings do not sanction the mere finding of abandonment of intent as sufficient grounds for eliminating oversight. The Tenth Circuit's remand is clearly in accord with the Supreme Court's recent rulings.

In *Board of Education v. Dowell*, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991), the Court examined the circumstances under which desegregation orders in a school case could be modified or dissolved. In *Dowell*, the Western District of Oklahoma found current segregation was not caused by a policy of the school board and held the previous injunctive decree should be vacated. The court of appeals reversed and remanded. This Court accepted *certiorari* to examine the evidentiary burden necessary to secure the vacation of a desegregation decree. In remanding for a hearing, the Court instructed the trial court as to the issue to be tried.

> A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders

> is obviously relevant. . . . The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.

Dowell, 112 L.Ed.2d at 729. This is exactly the inquiry which the Tenth Circuit sought in its initial remand in 1986 and now has explicitly instructed the trial court to make. It is the obvious question of "have they complied" which remains to be answered. Certainly, the Tenth Circuit cannot be faulted for directing the trial court to make this inquiry.

More recently, this Court reiterated the issues which need to be reviewed when a trial court is considering reducing oversight. In *Freeman v. Pitts*, ___ U.S. ___, 1992 W.L. 59190 (1992), this Court examined the question of the scope of a trial court's discretion to reduce the scope of its oversight, while still controlling some aspects of a defendants' operations. This is analogous to the trial court in this case ending its active supervision while leaving its injunctions in place. *Freeman* clearly instructs as to the scope of the inquiry which is necessary before a court begins to disengage:

> Among the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether

> the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law, and the constitution that were the predicate for judicial intervention in the first instance. In considering these factors, a court should give particular attention to the school system's record of compliance.

Id. at 15. The court of appeals has remanded this case for a review of the very issues required by *Freeman*.

The Tenth Circuit's remand is consistent with the decisions of this Court. The district court has been asked to review the state's compliance with the orders. This inquiry is mandated by *Dowell* and *Freeman*. A remand for this review does not provide an issue for *certiorari*.

CONCLUSION

There is no issue in this case at this time which warrants a grant of *certiorari*. The appellate court has ordered nothing other than a full hearing and findings of the status of compliance based on that hearing. This remand is in full compliance with the decisions of this Court and Rule 52 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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